Original Action No. 129

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Supreme Court, U.S.
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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

BRIEF OF AMICUS CURIAE LOUDOUN COUNTY SANITATION AUTHORITY IN SUPPORT OF REPLY BY THE COMMONWEALTH OF VIRGINIA TO THE EXCEPTIONS OF THE STATE OF MARYLAND TO THE REPORT OF THE SPECIAL MASTER

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I. INTRODUCTION, STATEMENT OF INTEREST OF AMICUS, AND SUMMARY OF THE ARGUMENT[1]

The Fairfax County Water Authority ("FCWA") instituted a plan to construct a drinking water intake structure in the channel of the Potomac River because the previous intake near the Virginia shore was subject to increased turbidity that raised treatment costs and created a greater risk of disease for consumers of treated water.[2] FCWA's plans set in motion a series of events that led Maryland to assert suzerainty over the rights of Virginia, its subdivisions, instrumentalities, and citizens in the waters of the Potomac River.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the amicus curiae have made any monetary contribution or monetary commitment to the preparation or submission of the brief. Counsel for Virginia was afforded the courtesy of previewing and commenting on the drafts of the brief prior to filing.

[2] While this action was pending, the State of Maryland granted permission for the FCWA to construct this intake. However, the new permit requires a flow-restrictor which limits FCWA's ability to withdraw water from the river.

A. Interest of Amicus Loudoun County Sanitation Authority.

The Loudoun County Sanitation Authority ("Loudoun Authority") is vitally interested in seeing that the Court affirms the findings of the Special Master. The Loudoun Authority is a public body politic and corporate and is also an instrumentality and political subdivision of the Commonwealth of Virginia authorized by the Virginia Water and Waste Authorities Act, Va. Code Ann. § 15.2-5114. The Loudoun Authority was created by action of the Board of Supervisors of Loudoun County pursuant to that legislation and was chartered by the State Corporation Commission on May 27, 1959. Because the Loudoun Authority has obtained the consent of both parties to this suit, it submits that it should be afforded *amicus* status as a matter of course under Rule 37.3(a), Rules of the United States Supreme Court.[3]

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[3] Letters of Consent from Virginia and Maryland have been lodged with the Clerk.

The Virginia Water and Waste Authorities Act and the Loudoun Authority's Articles of Incorporation provide that the Loudoun Authority is authorized to acquire, construct, improve, operate and maintain a water system for supplying and distributing water in Loudoun County. Loudoun County has imposed the responsibility upon the Loudoun Authority to meet the water needs of the citizens of Loudoun County. While the Loudoun Authority currently serves Eastern Loudoun County, its chartered service area includes all of the unincorporated areas of the County's approximately 517 square miles. The incorporated towns within the County operate water supply systems independently of the Authority.

In 1990, the Loudoun Authority provided water service to a residential population of 40,500 people. In 2002, the Loudoun Authority served a population of 120,000, an increase of over 190%. The Loudoun Authority estimates that it will be responsible to serve a population of 145,000 in 2005, 188,000 for the year 2010, and 265,000 for the year

2020. In 1990, the Loudoun Authority experienced a maximum daily water demand of 8.2 million gallons per day ("mgd") and expects this demand to grow to an ultimate water demand of approximately 75 mgd after 2020, an increase of over 900%.

Loudoun County is at the epicenter of Virginia's dispute with Maryland because Maryland's admitted efforts to regulate growth in Northern Virginia are principally directed against Loudoun County.

Although it might be possible for the Loudoun Authority to receive additional water capacity from the FCWA in the future, negotiations in this area have been slow, sporadic and uncertain. As a functional matter, the FCWA's new intake will not increase its overall capacity. The Loudoun Authority's ability to rely on the FCWA for its future water supply is uncertain at best. The FCWA's current permit to withdraw water from the Potomac River comes up for renewal in April 2008. A delay (or denial) by Maryland in granting a renewal similar to the delay in

granting the permit that was the initial subject of this case would have disastrous consequences for the citizens of Loudoun County. Furthermore, the flow-restrictor requirement imposed by Maryland in the existing permit stands as a stark reminder that Maryland still purports to retain the last word on any use of the river.

In an effort to meet the demands of its growing population, the Loudoun Authority purchased 22.7 acres along the Potomac River in Loudoun County, Virginia in 1993 for the purpose of constructing a water intake and treatment facility using Potomac River water. The Loudoun Authority plans to withdraw water from the Potomac River from its own intake system upon the non-tidal part of the Potomac River bordering the County. A "Master Plan" for meeting the current and future needs of the citizens of Loudoun County, including construction and use of the proposed intake, has been prepared and is under active consideration by the Authority's Board. The Loudoun Authority has undertaken a "Water Supply Augmentation

Study" as part of its Master Plan. As a result of this planning process, the Authority has determined that the Potomac River intake is necessary, and it intends to build the proposed intake. Maryland's claims of authority to regulate Virginia's use of the river stand as a substantial impediment to the Authority's ability to discharge its water supply responsibilities both in the present and the future.

Maryland's delay of the FCWA's intake for five years and its claims of right to prohibit or limit all intake permits, makes the orderly planning, design and construction of a water intake facility highly uncertain. The Loudoun Authority is at the point on its Master Plan where it would have begun the permitting process but for the fact that it is relying on Virginia in this suit to vindicate its right to be free from Maryland's permitting requirements. Should Virginia succeed in this regard, the Loudoun Authority will apply for the appropriate permits under 18 Va. Regs. Reg. 3601-03 (Aug. 26, 2001), which will become effective upon a favorable outcome in this case. Thus, putative *amicus*

Audubon Naturalist Society's ("ANS") stated concerns of a regulatory void are unfounded. (*amicus* Brief at 22).

B. Summary of the Argument.

By virtue of the Compact of 1785 between Virginia and Maryland, 1785 Acts c. XVII, codified in part at Va. Code Ann. § 7.1-7, 1786 Md. Laws c. I; the Black-Jenkins Award of 1877, Va. Code Ann § 7.1-7, Act of March 3, 1879, ch. 196, 20 Stat. 481, 483; this Court's decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910); the Potomac River Compact of 1958, Va. Code Ann § 28.2-1001, Md. Code Ann., Nat. Res. § 4-306 (2002 Supp.), Pub. L. No. 98-893, 76 Stat. 797 (1962); the Low Flow Allocation Agreement of 1978; and the Water Supply Cooperation Agreement of 1982, it is clear that Virginia, and her subdivisions, instrumentalities, and citizens, have the right to build structures in the river that do not obstruct navigation, and that Virginia has retained its rights of access to the Potomac River, including a right to withdraw and use water without the prior consent of Maryland.

Maryland requires that anyone seeking to construct a facility to withdraw water from the Potomac River obtain permits including a waterway construction permit and a water appropriation permit. Maryland conditions the issuance of such permits on a showing that the appropriation, in Maryland's sole view, is "necessary." On November 30, 1999, in response to the situation precipitated by the FCWA's request to build its proposed off-shore intake, the Attorney General of Virginia wrote to the Attorney General of Maryland demanding that Maryland either issue the permit or agree that permit approval is not required for such intakes. The Attorney General of Maryland replied on January 4, 2000, asserting Maryland's putative power to regulate Virginia's rights in the Potomac River.

As a consequence, the arguments of putative *amicus* ANS that Virginia's claims are moot or unripe are mistaken. Furthermore, the Commonwealth of Virginia clearly has standing to pursue this action *parens patriae*. The Commonwealth has a sovereign interest in protecting the

ability of her citizens to freely exercise their rights of access to the Potomac River free of the political whims of Maryland. Virginia also has quasi-sovereign interests in protecting the health and welfare of her citizens in general, which are being threatened by Maryland's express position on the use of Potomac River water, and in insuring that her residents are not being discriminatorily denied their rightful status within the federal system.

II. ARGUMENT

A. The Loudoun Authority's active plan to construct an intake into the Potomac River refutes the claims of ANS of mootness and lack of ripeness.

The Loudoun Authority is an owner of riparian property with a practical stake in the outcome of this proceeding. It therefore has a particular insight into the practical needs of a riparian owner actually intending to remove water from the Potomac River for the use of citizens of Northern Virginia above the fall line. As a consequence,

the Loudoun Authority has specialized information and a distinct perspective that may be helpful to this Court.

Contrary to the assertions of putative *amicus* ANS, there is at least one Virginia entity, the Loudoun Authority, which has imminent plans to withdraw additional water from the Potomac River. The Loudoun Authority's Master Plan calls for the construction of an intake into the Potomac River and a treatment facility that, together, will provide at least one-half of the County's daily water needs. This plan is not merely theoretical or a remote contingency; the plan has been extensively developed and is at the point where a permit would have been sought but for the fact that the Loudoun Authority agrees with the Commonwealth of Virginia's position that Maryland does not possess the authority to issue such permits.[4]

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[4] In fact, since July 2001 when your amicus submitted the declaration of Dale C. Hammes, the General Manager of the Loudoun Authority, for inclusion in the record (Va. Lodging 327), seven out of nine work tasks have been completed for the Water Supply Augmentation Study.

With respect to ANS' claim of mootness, the fact that a permit has been issued does not satisfy the heavy burden a litigant has when claiming mootness. As this Court has recently stated:

> It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' ... '[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'... In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' ... The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (*citations omitted*). Not only is the challenged activity here clearly capable of repetition, it

has not even ceased. Maryland, through its requirement for a flow-restrictor for FCWA and through its unretracted claims of right, continues to create a situation which requires judicial resolution.

With respect to ripeness, the controversy between Maryland and Virginia could hardly be more present, immediate and concrete than it is. *See Clinton v. City of New York*, 524 U.S. 417, 430 (1998).

In light of these circumstances, your *amicus* respectfully asks the Court to accept the recommendation of the Special Master and hold that "Virginia, its governmental subdivisions, and its citizens may withdraw water from the Potomac River and construct improvements appurtenant to the Virginia shore of the Potomac River free of regulation by Maryland." Report of the Special Master at 96-97. The Loudoun Authority, acting on behalf of the citizens of Loudoun County, Virginia, should be able to construct a water intake to meet the needs of those citizens free of the

political choices of Maryland officials who have no duty to the citizens of Loudoun County.

B. The Commonwealth of Virginia has standing to pursue this action *parens patriae*.

It is well settled that a state has standing to sue when its sovereign or quasi-sovereign interests are implicated. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). The water rights disputes present here touch on both interests.

Sovereign interests are those in which the state, if it were an independent nation, could resolve through the use of diplomacy or force. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Surely, the use of an interstate waterway, without having to defer to the sovereign claims of another state, constitutes such an interest. The *parens patriae* doctrine, "is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens." *New Jersey v. New York*, 345 U.S. 369, 372 (1953). Here, the position taken by the

Commonwealth of Virginia, that the citizens of Virginia should be free to exercise their rights in the river without submitting to the political agenda of Maryland, is a proper exercise of its sovereign responsibilities and thus falls squarely within the *parens patriae* doctrine. *See Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (holding that state "may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way").

The present case also touches on Virginia's quasi-sovereign interests. These interests fall into two general categories:

> First, a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). Virginia's interests are clearly implicated in both categories. It has been long established that where "the

health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." *Missouri v. Illinois*, 180 U.S. at 241; *see also Kansas v. Colorado*, 185 U.S. 125, 141-42 (1902) (observing that a state is the proper party to represent and defend its citizens when their health and comfort is threatened through the acts of another state depriving those citizens of water rights). The need for sufficient water for Loudoun County's and Northern Virginia's projected population strongly implicates the health and comfort of that population.

Furthermore, it is clear from the record before this Court that the citizens of Virginia face disparate treatment from Maryland in terms of access to the Potomac River. The express purpose of the supporters of the so-called Potomac River Protection Act was to curb the growth of Northern Virginia, with a focus on Loudoun County. Given the politicized treatment and consequent delay in processing the FCWA's request to build an offshore intake, there is no reason to believe the Loudoun Authority would fare any

better should it seek a permit. While the FCWA's permit was eventually granted after protracted delay and great expense, it is clear that Maryland officials can make the process difficult, time-consuming and expensive in order to serve Maryland's opposition to growth in Northern Virginia.

Finally, the position taken by putative *amicus* ANS that individual water authorities and jurisdictions must pursue individual actions to protect their own interests (*see amicus* Brief at 12), is unsupportable under the facts and circumstances of this case. In *New Jersey v. New York*, 345 U.S. 369 (1953), the Court held that the Commonwealth of Pennsylvania, which was allowed to intervene, was in a better position to represent the needs of all its citizens than the City of Philadelphia, which was not allowed to intervene, because Philadelphia represented "only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters." *Id.* at 373. Here, Virginia represents the FWCA, the Loudoun Authority and all of Virginia's other citizens

and subdivisions by virtue of *parens patriae*. The Loudoun Authority, in turn, is speaking only because the parties have consented, and the rules of this Court therefore permit its views to be aired.

The various sovereign and quasi-sovereign interests being asserted here are at least as varied and strong as those advanced by Colorado in *Colorado v. New Mexico*, 459 U.S. 176 (1982), where this Court noted:

> New Mexico also contends that Colorado is improperly suing directly and solely for the benefit of a private individual -- C.F. & I. ...
>
> ...
>
> ... While C.F. & I. will most likely be the primary user of any water diverted from the Vermejo River, other Colorado citizens may jointly use the water or purchase water rights in the future. In any event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the State. Faced with a similar set of circumstances in *Kansas v. Colorado*, 206 U.S. 46, 99, 27 S.Ct. 655, 668, 51 L.Ed. 956 (1907), we concluded that '[t]he controversy rises ... above a mere

> question of local private right and involves the matter of state interest and must be considered from that standpoint.'

459 U.S. at 181 n.9.

The present case is in all respects a concrete dispute among co-equal sovereigns of the sort that this court regularly decides.

III. CONCLUSION

Because the Report of the Special Master is correct in all respects, the Loudoun Authority requests that this Court adopt the Report of the Special Master and enter the Special Master's proposed Decree.

Respectfully Submitted,

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